JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 30, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2676

JAMES C. GABRIEL,

Appellant

v.

Missouri Pacific Railroad Co., et al.

(Civil No. 78-1476 - D.N.J. - Newark)

Submitted Under Third Circuit Rule 12(6)
June 16, 1982

BEFORE: SEITZ, Chief Judge, HIGGINBOTHAM, and BECKER, Circuit Judges.

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

s/ Seitz
Chief Judge

ATTEST:
s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: June 30, 1982

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 27, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2676

JAMES C. GABRIEL,

Appellant

v.

MISSOURI PACIFIC RAILROAD CO., ET AL.,

(Civil No. 78-1476 - D.N.J. - Newark)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED JULY 22, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, NEW JERSEY

Civ. No. 78-1476

JAMES C. GABRIEL, Pro Se,

Plaintiff,

-against-

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M. M. HENNELLY, JOHN H. LLOYD, D. B. JENKS and THOMAS J. O'LEARY,

Defendants.

FINDINGS OF FACT
CONCLUSIONS OF LAW

Plaintiff's motion, dated June 15, 1981, his 4th motion for reconsideration of Judge Sarokin's Order of April 7, 1981, was reassigned to the undersigned by Order of the Court, inasmuch as plaintiff, after Judge Sarokin had denied his three previous motions for reconsideration of the April Order, filed with the instant motion a claim against Judge Sarokin for an alleged deprivation of rights in the amount of $35,000,000.

Judge Sarokin's Order adopted, as the Opinion of the Court, Magistrate Perretti's Report and Recommendation filed December 31, 1980 (hereinafter "Report"). That Report, containing findings

of fact and conclusions of law, is incorporated herein with the same force and effect as if set forth in full.

Plaintiff has appeared *pro se* throughout. At oral argument it was stated by defendants' counsel, and not denied by plaintiff, that his stock involved in this action has a present market value of $2,200,000, and accumulated dividends (which plaintiff has not collected) aggregating $1,100,000.

I have reviewed the extended file in this matter, and heard full oral argument on July 13, 1981. I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff owns what was formerly Class B stock of defendant Missouri Pacific Railroad Company (MoPac). He filed this complaint for declaratory and injunctive relief on July 3, 1978. Jurisdiction was based on diversity.

2. Plaintiff demanded declaratory relief on four issues, (1) declaring that the B stock (allegedly owned by plaintiff) was entitled to vote as a class, (2) fixing the valuation of the B shares according to a formula contained in a certain agreed systems plan, (3) interpreting a certain opinion of the United States Supreme Court as being controlling in the instant matter and (4) declaring that the Interstate Commerce Commission Act may not be used to defraud the holders of class B stock in MoPac.

3. By a recapitalization plan of MoPac consummated in January 1974, each share of Class B stock owned by plaintiff and others was converted into new common stock. The recapitalization was made pursuant to:

Order

a. A judgment of the United States District Court approving the transaction in a class action in which plaintiff actively participated (Leighton, Ex. A); *Levin v. Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), "affirmed on Judge Weinfeld's opinion below" (Ex. B), *sub nom. Wesson v. Mississippi River Corporation,* 486 F. 2d 1398 (2d Cir. 1973), cert. den. *sub. nom. Wesson v. Levin,* 414 U.S. 1112 (1973), rehearing denied 415 U.S. 937 (1974). See Report, pp. 16-18.

b. An order of the Interstate Commerce Commission authorizing the recapitalization, pursuant to 49 U.S.C. §20a (Ex. C), in a litigated proceeding in which plaintiff actively participated. *Missouri Pac. R. Co. Securities,* 3471 I.C.C. 377 (1973), rehearing denied (Ex. D), petition for finding that an issue of general transportation importance is involved denied (Ex. E). That order was affirmed (Ex. F) *sub. nom. Gabriel v. United States,* 416 F. Supp. 810 (D. N.J. 1973 [three-Judge Court, Hunter C.J., Whipple & Fisher, D. JJ., opinion by Fisher, J.]), reargument denied (Ex. G), reconsideration denied (Ex. H) [illegible]rgument denied (Exh. I), reargument denied (Ex. J). This Court's order (Ex. F) was affirmed. 429 U.S. 1011 (1976), rehearing denied, *ibid.* 1124 (1977). The Commission's order was also affirmed, *sub. nom. Gillespie v. United States,* [unreported], Civil Action No. 74-239-C(2) (E.D. Mo. 1974 [three-Judge Court, Webster, C.J., Wangelin and Regan, D. JJ.]). (Ex. K). See Report, pp. 18-20.

4. Defendants moved to dismiss this claim for declaratory judgment, pursuant to Fed. R. Civ. P. 56(b), on the ground that the foregoing District Court judgment and the Interstate Commerce Commission Order are *res judicata* (Report p. 3). The Report says (p. 21):

Order

"It is clear beyond argument that all of the issues in this complaint which related to the 1974 recapitalization are res judicata";

See fuller discussion at pp. 15-21.

5. Plaintiff's other claim sought to enjoin defendants temporarily and permanently, from taking any further steps for approval or consummation of the September 1, 1977 'Plan and Joint Agreement of Merger, Consolidation and Recapitalization of MoPac'" (Prayer for Relief, paragraph 1; see Report p. 2). The Plan filed with the Interstate Commerce Commission pursuant 49 U.S.C. § 20a, sought approval of the exchange of stock of defendant Missouri Pacific Corporation for all of the outstanding minority shares of MoPac (Report pp. 6-8).

6. Defendants moved to dismiss this claim, pursuant to Fed. R. Civ. p. 12(b)(1), for lack of subject matter jurisdiction, on the ground that plaintiff had not exhausted his administrative remedies (Report p. 3). The Report recommended that dismissal be granted on this ground (pp. 10, 24; see fuller discussion at pp. 8-15).

7. Defendants also moved to enjoin plaintiff permanently from instituting proceedings against defendants on the facts alleged in the complaint, on the ground that any such proceedings would be vexacious (Report p. 3). The Report recommended granting such an injunction (P. 24; see fuller discussion at pp. 21-24).

8. Plaintiff filed exceptions (90 pages), supplemented by numerous exhibits (47 pages).

9. On March 6, 1981, Judge Sarokin ordered:

Order

"1. The Report and Recommendation of Magistrate Perretti filed December 31, 1980 be and the same hereby is adopted as the Opinion of this court.

2. For the reasons stated therein, the complaint in the above matter is DISMISSED, with prejudice and without costs."

10. On March 23, plaintiff moved for reconsideration, to set aside the foregoing Order. Defendants cross moved for reconsideration, to amend the Order to provide injunctive relief against instituting further suits in the Federal Court with respect to the 1974 recapitalization.

11. On April 1, plaintiff filed a second motion for reconsideration, to set aside the March 6th Order, and to transfer this JURY TRIAL to the Southern District of New York "if your Honor cannot have this JURY TRIAL tried in this New Jersey Court."

12. On April 6, Judge Sarokin sent the following letter to the parties:

"Plaintiff Gabriel has moved for reconsideration of the dismissal of the above-entitled matter dated March 9, 1981. Having read all of the papers submitted on behalf of all the parties in this matter, the court finds no new issues or law which would mandate reconsideration. Plaintiff's motion for reconsideration is, therefore, denied.

Defendant has requested that the court enter an injunction against the plaintiff, enjoining him from

instituting any suit in the federal court against any of the defendants or any other corporate officers or agents regarding any matter alleged in the complaint in the above-entitled matter which deals with the 1974 recapitalization. Authority for such an injunction may be found in *Montana v. United States,* 440 U.S. 147, 153-4 (1979).

Injunctive relief is a proper remedy under the circumstances of this action. Actions that are repetitious or that are intended to harass, as is the case here, must be enjoined. The plaintiff Gabriel is, therefore, enjoined from further litigation based upon the facts alleged in *Gabriel v. Missouri Pacific Railroad,* Civil No. 78-1476 in this or any other federal court against any of the defendants or other corporate officers or agents. The defendant will submit an appropriate order."

13. On April 7, Judge Sarokin signed the Order which is the subject of the instant motion for reconsideration. That Order reads:

"1. The Report and Recommendation of Magistrate Perretti filed December 31, 1980 be and the same hereby is adopted as the Opinion of this Court.

2. For the reasons stated therein:

a. The complaint in the above matter is DISMISSED, with prejudice and without costs;

b. Plaintiff is permanently enjoined from instituting any suit in the Federal Court against any of these defendants or any other corporate

officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization."

14. On April 10, plaintiff filed a third motion for reconsideration, to set aside the March 6th Order. On April 20, Judge Sarokin wrote to the parties:

> "For the reasons heretofore expressed and there being no additional facts or law presented, plaintiff's motion for reconsideration is denied."

15. On April 18, plaintiff filed his first motion for reconsideration to set aside the April 7th Order (33 pages).

16. On May 11, Judge Sarokin wrote to plaintiff, with the original to the Clerk and copy to defendants' attorneys, as follows:

> "I have reviewed your motion for reconsideration and reargument and said motion is denied. You are directed to file no further motions for reconsideration or reargument in this matter. You may pursue an appeal if you deem it appropriate. Thank you."

17. On May 19, plaintiff filed a second motion for reconsideration, to set aside the April 7th Order. This was couched in the form of a motion to set aside the May 11th Order, denying his motion for reconsideration and reargument of his complaint (31 pages).

18. On June 5, plaintiff filed a third motion for reconsideration, to set aside the April 7th Order. This was couched

in the form of a motion to set aside the May 11th Order, which had denied his motion for reconsideration and reargument of the April 7th Order (15 pages).

19. On June 9, Judge Sarokin signed an Order in the form of a letter to the parties. This reads:

> "The court has reviewed plaintiff's further motion for reconsideration, and said motion is denied. Plaintiff is ordered and directed not to file any further motions for reconsideration and reargument in this matter. If plaintiff violates the order of the court in this regard, the court will entertain an appropriate motion for counsel fees or other sanctions."

20. On June 23, plaintiff filed a fourth motion for reconsideration, to set aside the April 7th Order. This was couched in the form of a motion to set aside the June 9th Order, which denied reconsideration and reargument of the April 7th Order (21 pages). The caption reads in part:

> "THE HON. SAROKIN COURT HAS NO CONSTITUTIONAL RIGHT TO DEPRIVE ME OF MY JURY TRIAL CASE, THE COURT ACTING ON ITS OWN WITHOUT A JURY OF MY PEERS TO OVERSEE THE HON. SAROKIN COURT'S ACTION. *THEREFORE I AM HOLDING THE HON. SAROKIN COURT LIABLE FOR SUM OF $35,000,000 DAMAGES THAT A JURY WOULD HAVE BEEN INSTRUMENTAL IN HELPING PLAINTIFF GET FROM DEFENDANTS BY DIRECTING THE I.C.C. TO EVALUATE PLAINTIFF'S*

MOPAC CLASS B SHARES UNDER DUE PROCESS OF LAW UNDER A SECTION 19a (49 U.S.C. Sect. 19a) PROCEEDINGS, ***WHICH THE MISSOURI PACIFIC RAILROAD CO. WOULD HAVE HONORED WITH NEW RAILROAD STOCKS.***

21. At the oral argument on the morning of July 13, the Court made the following rulings:

> "I've gone over the materials you submitted. I see no basis at all for granting your motion for reconsideration and, accordingly, your motion for reconsideration is denied *** Let me tell you that as well, that when this order is prepared we will put a stop to this. The clerk is directed not to take any more papers from you in this matter. And I will tell you this, that I want this order prepared to that effect. And this is not a threat but, on the other hand, I do have to counsel you this, that I don't have my orders flaunted lightly, and if I have to impose sanctions, I will."
>
> * * *
>
> "With respect to any case in which you would have a jury trial, if on the papers you don't have a basis in law for going to the jury, you don't go to the jury. That's the first point. Secondly, you complain about the magistrate having prepared a report and recommendation. That's pursuant to statute."

22. On the afternoon of July 13, plaintiff submitted a paper stating:

Order

> "Plaintiff pro se has been obeying and following Rule 12-I . . . The Hon. Frederick B. Lacey Court cannot punish me for following Rule 12-I. I have a right to follow Rule 12-I. That is my Constitutional right. I have a constitutional right to protect my property according to the 5th and 14th Amendments of the United States Constitution."

23. The same document contains a notice to the Clerk, quoting Rule 12-I, and concluding "According to Rule 12-I of the above Rules, I have a right to file a motion for reargument within 14 days after the filing of the Court's Order. I have a right to do this."

24. On July 15, plaintiff submitted a paper repeating the language of Rule 12-I, and repeating the foregoing arguments.

25. Plaintiff was a party of record in the Interstate Commerce proceeding which his complaint seeks to enjoin (Report, pp. 8-9). Since the filing of the complaint, on September 25, 1978, the Commission approved the Recapitalization Plan, and denied rehearing on March 8, 1979 (Report, p. 11). "Although plaintiff dropped out of the ICC proceedings, his brother, Napoleon, remained as a party of record and continued to flog the same issues in his petition for administrative review." (Report, p. 21). This petition was filed in the Court of Appeals for the District of Columbia, where Napoleon Gabriel was acting *pro se*.

26. On March 6, 1981, the Court of Appeals entered an Order assigning the cause to a panel, and dispensing with oral argument. This Order was signed by the Clerk by direction of the Court.

Order

27. On March 25, 1981, the Court of Appeals rendered a judgment from which the following is quoted:

> "Petitioners have engaged for several years in a quest to receive more for their Class B stock than they were allotted in the 1974 recapitalization of Missouri Pacific Railroad Company. They have presented and re-presented their claim in several contexts and forums. We have reviewed the ponderous papers filed by the parties and the prior adjudications in point. Based on this review, we find the Commission's conclusion irresistible.
>
> The matters petitioners would raise yet again have been carefully considered and rationally determined by several courts and by the Commission itself in earlier proceedings. No new issue of substance appears in the briefs before us. While we do not on this occasion enter a coercive order against petitioners, *cf. James C. Gabriel v. Missouri Pacific Railroad,* Civil No. 78-1476 (D.N.J. March 6, 1981) (adopting December 31, 1980 Magistrate's Report and Recommendation), we cannot conceive a case more appropriately subject to the law of res judicata. 'Finality . . . is the service rendered by the courts through the operation of the law of res judicata.' Restatement (Second) of Judgments, Introduction at 13 (Tent. Draft No. 7, 1980). By this order we perform that service.
>
> On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of

the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

Per Curiam

For the Court

George A. Fisher, Clerk"

28. On April 2, the Court of Appeals made an Order denying the motion of petitioners to be permitted to file additional evidence to correct the record.

29. On April 24, the Court of Appeals filed the following Order:

"Petitioners' suggestions for rehearing *en banc* in each of these consolidated cases have been circulated to the full Court and no judge of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court, *en banc* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk"

30. On June 2, he Court of Appeals filed the following Order:

Order

"The motion of appellant [Napoleon] Gabriel for reconsideration of the Court's order of April 24, 1981 denying the petition for rehearing *en banc* has been circulated to the full Court. The Court is of the unanimous opinion that the motion for reconsideration is not an authorized nor proper submission and it is therefore,

ORDERED by the Court *en banc* that the Clerk is directed to return the motion for reconsideration unfiled.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk"

31. On June 15, petitioner Napoleon Gabriel submitted to the Court of Appeals a motion for reconsideration of the June 2 Order, on the following ground:

"THERE WERE NO PERSONAL SIGNATURES AFFIXED BY THE COURT'S JUDGES ON ORDERS, DECISION AND JUDGMENT ON THIS CASE, MAKING THEM NOT LEGAL-NUL AND VOID. DUE PROCESS EVALUATION ARE RIGHTS SECURED TO PETITIONER BY U.S. CONSTITUTION. I EXPECT HON. JUDGES TO LIVE UP TO THEIR OATH OF OFFICE."

30. On June 29, petitioner Napoleon Gabriel submitted to the Court of Appeals a second motion for reconsideration of the June Order on the ground that the Clerk had no right to sign

the Order of March 6th dispensing with oral argument. The Motion continued:

> "Because of the above reasons, and other reasons too numerous to mention, the above captioned cases have not been terminated, but they are still alive in this Court. I am holding the Clerk of this Court personally responsible for $25,000,000 MoPac Class B values."

33. The two foregoing motions of petitioner Napoleon Gabriel, while stamped "Received" according to the usual practice of the Clerk's Office, were neither docketed nor submitted to the Court.

CONCLUSIONS OF LAW

1. Rule 12(I) authorizes a single motion for reargument; it does not permit more than one.

2. This Rule cannot be circumvented by plaintiff's procedure of moving to reconsider an Order, and upon denial of that motion, moving to reconsider the Order of Denial.

3. Plaintiff's motion of June 15, 1981, repeated on June 23, 1981, being the fourth motion to reconsider Judge Sarokin's Order of Dismissal April 7, 1981, should be dismissed as not authorized by the Rules.

4. If plaintiff's foregoing motions were subject to consideration on the merits they would have to be denied, inasmuch as they do not set forth any relevant matters or controlling decisions which the Court has overlooked.

Order

5. The actions of plaintiff and of his brother described in the Findings of Fact and in the Report, establish the strong probability that plaintiff may continue to bombard this Court and defendants with additional repetitive papers. The Court has jurisdiction to direct the Clerk to refuse to accept, docket or submit to the Court any further papers in this action, except for a Notice of Appeal.

6. The above described actions of plaintiff and his brother establish the strong probability that plaintiff may institute suit for substantial damages against Judge Sarokin, and against the Clerk and his subordinates. The Court has jurisdiction to enjoin such frivolous and vexacious litigation, intended to harass those persons in the performance of their official duties, and using the courts as a stage for plaintiff's vendetta of harassment and abuse, with the result of burdening the heavy case loads of the courts and obstructing the application of justice in more meritorious cases (see Report, pp. 22-23).

It is therefore, on the 22 day of July, 1981

ORDERED:

1. Plaintiff's motions to reconsider Judge Sarokin's Order of April 7, 1981 are dismissed.

2. Plaintiff's motions to reconsider Judge Sarokin's Order of April 7, 1981 are denied on the merits.

3. The Clerk of this Court is directed not to accept, nor to docket, nor to submit to the Court any further papers in this case, except for Notice of Appeal.

Order

4. Plaintiff is permanently enjoined from instituting suit in any court against Judge Sarokin, the Clerk of this Court, or any of his subordinates, in respect of any matters involved in this action.

s/ Frederick B. Lacey
Frederick B. Lacey
United States District Court Judge

All of the foregoing is based upon the determination of the Court as set forth in the hearing of the oral argument on July 13, 1981.

s/ Frederick B. Lacey
Frederick B. Lacey
United States District Court Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 7, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 78-1476

JAMES C. GABRIEL,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, et al.,

Defendants.

It is on this 7 day of April 1981, ORDERED:

1. The Report and Recommendation of Magistrate Perretti filed December 31, 1980 be and the same hereby is adopted as the Opinion of this Court.

2. For the reasons stated therein:

a. The complaint in the above matter is DISMISSED, with prejudice and without costs;

b. Plaintiff is permanently enjoined from instituting any suit in the Federal Court against any of these defendants or any

other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

s/ H. Lee Sarokin
H. LEE SAROKIN
United States District Judge

FILED
Apr. 7, 1981
Angelo W. Locasio

REPORT AND RECOMMENDATION OF MAGISTRATE PERRETTI DATED DECEMBER 30, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 78-1476
Hon. H. Lee Sarokin

JAMES C. GABRIEL,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M. M. HENELLY, JOHN H. LLOYD, D. B. JENKS AND THOMAS H. O'LEARY

Defendants.

According to the complaint in this action, the plaintiff is a stockholder in the Missouri Pacific Railroad Company, which will be called MoPac. MoPac's application to the Interstate Commerce Commission for approval of a plan of merger and an exchange of stock has been approved by that agency and the plaintiff disagrees with the order of the Commission.

Named as defendants in this case are MoPac, the Missouri Pacific Corporation, a Delaware holding company, and two officers of each of those corporations.

Plaintiff claims that jurisdiction is based on diversity of citizenship, the amount in controversy exceeding $10,000.00. Plaintiff is a citizen of the state of New Jersey. Defendant MoPac

is a corporation of the state of Missouri with its principal place of business in that state and defendant Missouri Pacific Corporation is a Delaware corporation having its principal place of business in Missouri. The individual defendants are said to be citizens of the state of Missouri as well.

At the time of the filing of the complaint MoPac's application to the ICC had not yet been ruled upon by the Commission but its application was pending. Plaintiff demanded that this court enjoin the defendants from processing any further steps before the ICC in consummation of the merger and recapitalization of MoPac which had been voted upon by that corporation's stockholders. In addition, the plaintiff demanded declaratory relief on four issues, (1) declaring that the B stock (allegedly owned by plaintiff) was entitled to vote as a class, (2) fixing the valuation of the B shares according to a formula contained in a certain agreed systems plan, (3) interpreting a certain opinion of the United States Supreme Court as being controlling in the instant matter and (4) declaring that the Interstate Commerce Commission Act may not be used to defraud the holders of class B stock in MoPac.

During the pendency of this action the Interstate Commerce Commission has ruled on MoPac's application and has approved it and the Commission's order is now on appeal before the Court of Appeals in the District of Columbia pursuant to 28 U.S.C. §2321. A letter memorandum from plaintiff dated December 13, 1980, ignores the fact that the ICC proceedings have already been terminated. This lapse is symptomatic of the problems posed by plaintiff's entire case. It is apparent that plaintiff does not accept the occurrences of the past 25 years which have related to the interest which he holds in the Missouri Pacific Railroad Co. Plaintiff attacks the merger plan almost entirely on the basis of a misinterpretation of past events which will be elaborated upon in this report. The plaintiff does allege, however, with specific

application to the plan of merger, that the exchange of stock would not reflect the real value of the MoPac shares. Plaintiff further alleges in a most conclusory manner that the ICC makes its decisions strictly on the basis of the applications made by the carriers without considering the testimony and briefs of objecting stockholders. In support of this position the plaintiff attaches to his complaint an extract from a book entitled, *The Superlawyers,* by Joseph C. Gulden.

Defendants have moved pursuant to Rule 12(b) Fed. R. Civ. P. to dismiss for lack of subject matter jurisdiction, for lack of jurisdiction of the person of the individual defendants and Missouri Pacific Corporation and on the ground that the plaintiff's claims are barred by *res judicata.* Defendant also seeks to enjoin plaintiff permanently from instituting proceedings against defendants on the facts alleged in the complaint on the ground that any such proceedings would be vexatious. The parties having presented matters outside the pleadings, the motions are treated as for summary judgment. The original motion was filed on August 25, 1978 and the plaintiff has continued to present material until December of 1980. Plaintiff has been afforded a reasonable opportunity to present his position and no further material in connection with the motion will be received.

Although the complaint has 33 pages, the plaintiff's allegations may be briefly summarized. Plaintiff claims that the Missouri Pacific Railroad Company was reorganized after bankruptcy and its reorganization was approved by the Interstate Commerce Commission on July 29, 1954 in an order at 290 ICC 477. He calls the reorganization the "Agreed System Plan". Under the agreed system plan two classes of stock were set up. A non-cumulative preferred class A with voting rights and a class B, common stock, with very limited voting rights. Plaintiff calls the class B Shares "Equity Bearing MoPac Common". He says,

correctly, that under the agreed system plan a majority vote of each class was required for approval of any plan of recapitalization. The complaint further alleges that the principal stockholder of MoPac class A was the Mississippi River Fuel Corporation. In 1966 Mississippi River Fuel voted its A shares to merge MoPac with the Texas and Pacific Railway and to issue a single class of shares of new stock in the merged railway. The complaint points out that this effort resulted in the case of *Levin v. Mississippi River Fuel Corp.* 386 U.S. 162 (1967), in which the Supreme Court held that the plan of merger could not be effectuated without the approval of each class of stock as was required by MoPac's Articles of Association and the laws of the state of Missouri (thereafter the MoPac-Texas Pacific merger was abandoned by the two railroads).

The Mississippi River Fuel Corporation changed its name to Mississippi River Corporation and continued as the owner of the majority of the outstanding Class A stock of MoPac. The majority holder of the B stock was the Allegheny Corporation. Plaintiff alleges that Allegheny was a motor carrier under the jurisdiction of the Interstate Commerce Commission which had ordered it to divest itself of its class B shares in the rail carrier MoPac. The complaint indicates that Allegheny's class B MoPac shares were actually controlled by the ICC. However, a copy of an ICC report furnished by plaintiff, Allegheny/Jones Motor Co., 109 MCC 333, indicates that Allegheny's MoPac shares were held under a trusteeship which had been previously ordered by the commission.

According to the complaint, a class action was certified on October 9, 1968 by Hon. F. P. Bryan in the Southern District of New York. The suit alleged that the class B dividends were too low and that the directors of MoPac were favoring the class A stockholders to the benefit of Mississippi River Corporation.

Allegheny Company was a class representative. The suit resulted in a settlement which the plaintiff did not approve. The complaint alleges "It is unconstitutional, against due process, to hold dissenters in a Class Action". The complaint further alleges that the settlement was contrary to agreed system plan. According to the complaint, the settlement involved an agreement between Allegheny and MoPac for the transfer of the Allegheny class B shares to the Mississippi River Corporation at an agreed value. The settlement agreement was put to a vote of the stockholders voting by classes. The plaintiff complains that the proxy statement did not reveal that Allegheny had important financial reasons for wishing to dispose of its class B common shares, that is to say, the Jones Motor Company matter was not explained in the proxy statement. Plaintiff cast his class B shares against the plan but the majority of both classes voted for a recapitalization which involved a conversion of the class A preferred into a new MoPac common and the elimination of class voting. The recapitalization was also the subject of an application for approval by the ICC which was granted in December, 1973. Omitted from the complaint is all reference to the case of *Gabriel v. United States,* 416 Fed. Supp. 810 (D.N.J. 1976), an appeal to a three judge court to set aside and annul the order of the ICC which approved the recapitalization and authorized the issuance of the securities in accordance with the plan. *Gabriel v. United States* will be discussed in connection with a review of the defendants' position in this matter.

The allegations of the complaint skip to events which occurred in 1977. Mississippi River Corporation had changed its name to Missouri Pacific Corp. which is said to be a Delaware holding company owning 92.3% of the shares of MoPac. The old Allegheny class B shares had been exchanged for MoPac common under the 1973 recapitalization plan and had been sold to Missouri

Report and Recommendation

Pacific Corp. in accordance with the settlement worked out in *Levin v. Mississippi River Corporation,* the class action. The plaintiff had not surrendered his class B shares and makes the following allegation in his complaint:

> The fact of the matter is that Class B as of today controls the MoPac veto according to the U.S. Supreme Court Decision: Levin v. Miss, 386 US 162, 170 (1967) a "Plan" may not be adopted without the consent of at least a majority of CLASS B.
>
> Plaintiff CLASS B MoPac stockholder has been and is presently being severely damaged by Defendants who are working in concert to take away his Class B values and transfer them to MPC to enrich themselves . . . .

According to the complaint, MoPac and Missouri Pacific Corporation proposed in 1977 to merge MoPac into Missouri Pacific Corporation. Each share of MoPac common which was issued in the 1973 recapitalization would be exchanged for .95 share of Missouri Pacific Corporation stock. Plaintiff alleges that this plan is unfair in that it undervalues the class B shares which he holds. In addition, he alleges that the holding company which has power to elect the MoPac board of directors "is using that power to the detriment of all the MoPac shares, including the Class B MoPac Common shares. MPC is misusing [the ICC proceeding] to try to take over all remaining MoPac shares." Plaintiff charges that Missouri Pacific Corp. will receive "enormous financial benefits" from the merger the purpose of which is a "conspiracy to defraud the Class B equity bearing MoPac Common stockholders."

Report and Recommendation

According to the complaint the plaintiff attended a special meeting of the stockholders of MoPac held on December 9, 1977 for the purpose of voting on the plan of merger. The complaint states that there remain 1,015 shares of class B which had not been exchanged. Plaintiff voted 76% of these shares against the proposal. He alleges that this constitutes a veto of the plan since "The law requires the assent of the majority of the MoPac shareholders on a separate Class vote basis".

Defendants, according to the complaint, are "pretending Class B MoPac equity bearing Common shares which are the residuary beneficiaries of the Missouri Pacific RR properties don't exist . . . .". The plaintiff's purported veto, having been disregarded by the defendants, an application was made to the ICC on December 20, 1977 for approval of the plan of merger and the issuance of new stock in exchange for the MoPac shares. Plaintiff contends that the exchange ratio is unfair as to him because it undervalues his class B stock. He argues that this is so because the 1973 recapitalization in its turn undervalued the class B stock. The complaint goes on to say that the class B stock must be evaluated "at their real true value" based on an appraisal of the assets of MoPac including its land holdings and its mineral rights. In this connection the plaintiff alleges that the defendants are attempting to conceal the fact that the corporation is the owner of extensive land which was granted to it in the 1800's.

In order to forestall action by the ICC on the defendants' application, action which plaintiff believes would be favorable to MoPac, his complaint seeks to enjoin the defendants from taking further steps to obtain approval of the plan. As has been seen, the plaintiff also seeks declaratory judgment.

Report and Recommendation

SUBJECT MATTER JURISDICTION

Plaintiff claims that the jurisdiction of this court is based on diversity of citizenship and his prayer is for relief against the named defendants. The effect of the relief sought, if granted, would be to enjoin a proceeding pending before the ICC and to give a court's adjudication of matters pending before that commission. The circumstances which existed when plaintiff filed his complaint are established by the exhibits offered by defendants in support of their motion. A decision of the Interstate Commerce Commission dated May 9, 1978 in connection with the Missouri Pacific Railroad Company merger, ordered that the proceeding would be handled under a modified procedure which set up a time-table for the filing of written submissions and the determination of the matter on the papers submitted. Plaintiff, James C. Gabriel, was a party of record in that proceeding. The decision of May 12, 1978 contains the following:

> Certain of the commentators allege that the proposed merger and consolidation will diminish the value of their Class B common shares of Missouri Pacific Railroad Company, a Missouri corporation (MoPac), and that the plan is for various other reasons contrary to the public interest. The primary contention relates to questions exhaustively examined in prior proceedings. In 1973, the United States District Court for the Southern District of New York approved a settlement agreement in an action originally directed at MoPac's dividend policy with respect to the Class B stock. *Levin v. Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y.), *aff'd mem. sub nom. Wesson v. Mississippi River Corporation,* 486 F.2d 1398 (2d Cir), *cert denied,*

414 U.S. 1112 (1973), *reh. denied,* 415 U.S. 939 (1974). The railroad then sought Commission authority to issue certain new types of stock to effectuate the settlement agreement and the recapitalization plan which it encompassed. The Commission determined, and the reviewing courts agreed, that the offer of exchange for Class B stock represented the fair value of those securities, and that the plan was reasonable to all parties and in the public interest. *Missouri Pac.R. Co., Securities,* 347 I.C.C. 377, 411, 417 (1973), *aff'd sub non. Gabriel v. United States,* 416 F. Supp. 810 (D. N.J.) *aff'd,* 429 U.S. 1011 (1976), *reh. denied,* 429 U.S. 1124 (1977); *Commission decision also aff'd sub nom. Labelle Gillespie v. United States,* Civil Action No. 74-239-C(2) (E.D. Mo. 1974). Unwilling to accept the finality of those determinations, the noted commentators have never exchanged their old Class B shares for the presently-outstanding MoPac Common Stock, and would now have us reconsider the recapitalization proceedings. The Commission and the courts have fully reviewed and approved the recapitalization, however, and the matter is now *res judicata.* We cannot permit the holders of unexchanged Class B stock to use the occasion of our review of the instant proposals as a vehicle for re-examination of issues finally determined in previous proceedings, and we will not entertain arguments directed at the fairness or propriety of the prior recapitalization.

It must be concluded that the plaintiff filed this action as a direct response to the Commission's decision of May 12, 1978.

Report and Recommendation

No matter how it is designated in the complaint, the action is nothing other than an attempt to appeal the May 12, 1978 ruling of the Commission. It is obvious that the ruling was not a final order of the Commission. Apparently plaintiff determined not to go forward before the Commission on the Commission's terms.

It is settled law that a court cannot enjoin administrative action until administrative remedies have been exhausted. *Meyers v. Bethlehem Corp.*, 303 U.S. 41 (1938).

In *Meyers*, the district court, enjoined the National Labor Relations Board from holding a hearing on a complaint of unfair labor practices at Bethlehem's Fore River Plant. Bethlehem's contention was that the plant's operations did not involve interstate or foreign commerce; and therefore that the hearings would be futile, and their holding would cause bad labor relations, impaired efficiency, and substantial expenses. (327 U.S. at 47-8).

In reversing the court said, per Brandeis, J. (327 U.S. at 50-1):

> The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.
>
> Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of

> the prescribed administrative hearing would result in irreparable damage. (fns. omitted).

"If it be the policy of the law that the Labor Board cannot be enjoined from conducting a hearing on the complaint made, it would not seem proper that this policy could be nullified and evaded by permitting an injunction prohibiting the defendants from originating the complaint which would be the subject of hearing by the Labor Board." *Burlington Mills Corp. v. Textile Workers Union,* 44 F. Supp. 699, 702 (W.D. Va. 1941). See to the same effect *Capital Transit Co. v. Safeway Trails,* 201 F.2d 708 (D.C. Cir. 1953).

There is no doubt that the Interstate Commerce Commission has exclusive jurisdiction over the applications presented to it by MoPac. *Schwabacher v. United States,* 334 U.S. 182 (1948). Upon a final ruling by the Commission, a party aggrieved may obtain judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. §702 in the Court of Appeals, 28 U.S.C. §2321.

Since the filing of the complaint in this court, the ICC has issued its final order on the application. The ICC decision is dated September 25, 1978 and the petitions for administrative review by the Commission were denied on March 8, 1979. One of the petitioners for review was plaintiff's brother, Napoleon C. Gabriel. Napoleon's assault upon the Commission's decision was based upon the argument that class B stockholders were not bound by the 1974 recapitalization of MoPac. Napoleon demanded that his class B common stock be evaluated according to the terms of the 1956 agreed systems plan. It can be seen that his position before the ICC is identical to that taken by his brother, the plaintiff in this matter.

Report and Recommendation

Because of the passage of time, the facts to which the plaintiff addresses himself have changed. While he originally sought to enjoin defendants from processing their application before the ICC, that application has now been approved. The plaintiff's prayers for declaratory relief are now directed at a final order of the Commission. The declaratory relief, if granted, would reverse not only the Commission's decision of May 12, 1978, but also the final decision of September 25, 1978 and the denial of petition for administrative review dated March 8, 1979. Judicial review of the Commission's orders is provided for in 28 U.S.C. §2321 which reads, in pertinent part, as follows:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the Court of Appeals as provided by and in the manner prescribed in Chapter 158 of this title.

The jurisdiction of the court of appeals to review actions of the Interstate Commerce Commission is established by 28 U.S.C. §2352, the relevant portions of which read as follows:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of - . . .
> All rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by § 2321 of this title . . . . Jurisdiction is invoked by filing a petition as provided by Section 2344 of this title.

Report and Recommendation

28 U.S.C. §2344 provides that the action for review shall be against the United States. 28 U.S.C. §2322 also provides that "All actions specified in § 2321 of this title shall be brought by or against the United States". The relief which plaintiff seeks and the application for merger which was pending before the Interstate Commerce Commission do not involve in any way any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties and forfeitures. Thus, 28 U.S.C. §1336(A) and 28 U.S.C. §1398 are inapplicable.

One of the primary objectives of the Congress in providing for judicial review of Interstate Commerce Commission orders by the court of appeals was to prevent a multiplicity of suits relating to the same subject matter. H.R. REP. NO. 93-1569, 93d Cong. 2d Sess. *reprinted* in [1974] U.S. CODE CONG. & AD. NEWS 7025. To permit this plaintiff to disregard the statutory method of securing review of the Commission's orders by invoking this court's jurisdiction under the guise of a diversity case would vitiate the congressional plan and objective. Entertaining the suit under diversity jurisdiction would encourage the bringing of multiple suits challenging a single ICC order in different locations before different courts. This would totally defeat the congressional intent "to vest exclusive jurisdiction in the court of appeals in which the agency record is first filed . . ." *Id.* at 7033.

A district court has no subject matter jurisdiction in this case because "exclusive jurisdiction over this action is vested in the court of appeals pursuant to 28 U.S.C. §§2321 and 2342." *Chemical Leaman Tank Lines, Inc. v. U.S.*, 446 F. Supp. 721, 724 (D. Del. 1978), "orders other than those involving monetary matters are of course now subject to review only by the Courts of Appeals under [28 U.S.C. §2321]", *Quaker State Oil Refining Corp. v. U.S.*, 465 F. Supp. 75, 76 (W.D. Pa., 1979).

Report and Recommendation

State of Minn., by Spannaus v. O'Neal, 472 F. Supp. 905 (D. Minn. 1979), involves an attempt to bypass the provisions of 28 U.S.C. §2321 and §2342 by invoking the jurisdiction of the district court under the guise of a petition for mandamus. In the *Spannaus* case there were pending before the ICC, applications by various railroad companies to abandon certain lines within the state of Minnesota. The ICC made an environmental evaluation of each proposed abandonment and concluded that inasmuch as the abandonments did not constitute major federal actions significantly affecting the quality of the human environment, no environmental impact statement would be required. The Commission had not issued a decision on the merits in any of the abandonment proceedings when plaintiff petitioned for the writ. The court relied on *Meyers v. Bethlehem Shipbuilding Corp., supra,* in holding: "Judicial review of administrative agency decisions must be postponed until available administrative remedies have been exhausted." 472 F. Supp. at 907. The court concluded as follows at 472 F. Supp. at 908:

> In any event, even if judicial review were available at this time, exclusive jurisdiction would lie in the court of appeals, not this court, 28 U.S.C. §§2321, 2342. Where exclusive jurisdiction is mandated by statute, as it is here, plaintiff cannot by-pass the procedure which Congress has provided by labeling its requested relief "mandamus." *North American Van Lines v. Interstate Commerce Commission,* 386 F. Supp. 665, 681 (N.D. Ind. 1974). Where a statute specifically provides for exclusive jurisdiction in one court, as 28 U.S.C. §2342 does, this specific grant of jurisdiction takes precedence over a general grant of jurisdiction, *ITT v. Vencap, Ltd.,* 519 F.2d 1001 (2d Cir. 1975);

Report and Recommendation

Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968).

An identical view of the law is stated in *B.F. Goodrich Company v. Northwest Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), a case which arose under the since-repealed three judge court method of review of ICC orders. Goodrich sought in effect to enforce section 5(2) of the Interstate Commerce Act (now 49 U.S.C. §11343), by an action in the district court requesting an injunction restraining Industries from acquiring Goodrich stock without first obtaining Commission approval. Goodrich had sought the same relief by intervening in a merger proceeding before the Commission, in which Industries was a party. The Commission had denied the relief sought by Goodrich.

It was held at 424 F.2d at 1352-4:

> We agree that the District Court had no jurisdiction over the Goodrich complaint. The complaint was in substance a collateral attack on an order of the Commission and an attack on such an order may be brought only before a three judge court . . . . *Venner v. Michigan Central Railroad Co.*, 271 U.S. 127.
>
> The statutory procedure for review is applicable although an order is not directly attacked—so long as the practical effect of a successful suit would contradict or countermand a Commission order. *Venner v. Michigan Central Railroad, supra.*

The above language is directly applicable to plaintiff's complaint. Since the complaint was filed, the Commission has

entered an order authorizing elimination of the interest in Missouri Pacific Railroad Company of the minority shareholders (including this plaintiff).

It is respectfully recommended that the complaint be dismissed for lack of subject matter jurisdiction.

THE VEXATIOUS NATURE OF THE COMPLAINT

The issues raised in the complaint, the demand for relief and the arguments of the plaintiff in support of his position have been summarized in the discussion of the contents of plaintiff's complaint. Plaintiff has presented the identical matters to a variety of forums over the course of the years. None of the forums have been receptive to the plaintiff's claims and the repetitive and vexatious nature of his claims have been called to his attention on past occasions. He, however, persists in pursuing issues which have been repeatedly decided against him.

The issues presented by the plaintiff in this case were first dealt with and disposed of in *Levin v. Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), *Aff'd. sub nom Wesson v. Mississippi River Corporation,* 486 F.2d 1398 (2nd Cir 1973) *cert. denied, sub nom Wesson v. Levin,* 414 U.S. 1112 1973, *rehearing denied,* 415 U.S. 937 (1974). Under MoPac's 1956 reorganization plan, the Class A stockholders had voting control while the Class B stockholders had the residual equity and a veto power over mergers, consolidations and reorganizations. "In practical terms, the 'ingenious' solution envisioned under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock." 59 F.R.D. at 358. The situation led to the *Levin* case which was certified as a class action by Hon. Frederick P. Bryan. The class was certified within

the provisions of Rule 23(a)(b)(1) and (2) Fed. R. Civ. P. and the members of the class were all Class B stockholders. A copy of the order has been submitted in support of this motion. According to the plaintiff's complaint he opted out of the class action. However the privilege of being excluded from the judgment only exists in actions brought under Rule 23(b)(3), Wright and Miller, Federal Practice and Procedure: Civil §1787.

The *Levin* case was vigorously and exhaustively litigated. A chronology of the proceedings in that case will demonstrate the plaintiff's persistence in the face of warnings from the courts. A final judgment approving the settlement was entered May 2, 1973. The judgment was affirmed by the Second Circuit Court of Appeals and within the same year the United States Supreme Court denied certiorari. While the matter was on appeal, a motion was made to the District Court to set aside the judgment. The motion raised the Allegheny/Jones matter. It was denied on December 5, 1973, the district court holding that the subject had been considered in the original hearing to approve the judgment. In early 1974 the Supreme Court denied a rehearing of its denial of certification.

After the denial of the rehearing by the Supreme Court there was a motion to vacate the final judgment. This motion attacked the class certification. It was denied on April 8, 1974. The denial was affirmed by the Second Circuit on December 18, 1974. Certification was denied in 421 U.S. 915 (1975). A rehearing was denied, 421 U.S. 1006 (1975) and a second petition for rehearing was rejected by the Clerk of the Supreme Court. While this was going on, plaintiff moved in the district court to set aside the judgment and the motion was denied on March 21, 1975. The denial was affirmed by the Second Circuit November 18, 1975, which contains the following warning to plaintiff: "Although at this time we will not act pursuant to appellees' suggestion that

costs be imposed upon Gabriel under FRAP 38, further appeals of this nature in a matter already so thoroughly litigated may justify the imposition of such a sanction."

Even while the appeal to the circuit was pending, plaintiff made a second motion to the district court to set aside the judgment which was denied June 3, 1975. The opinion states, "Petitioner Gabriel's motion to re-open is hereby denied. Court finds motion vexatious and orders movant to pay $100.00 counsel fees . . . ."

Plaintiff returned to the court of appeals and requested an extension of time to file a petition for a rehearing *en banc* of the circuit's affirmance on November 18, 1975 of the denial of plaintiff's motion to set aside the judgment. The motion for extention of time was denied on December 16, 1975. Plaintiff's motion to reconsider the motion to extend the time was denied on January 7, 1976. Plaintiff's motion to reconsider the motion to reconsider the motion to extend the time was denied on February 2, 1976. The order stated, "this court will not consider any further motions for reconsideration in this appeal."

While thus engaged in the *Levin* case, plaintiff was also busy elsewhere. MoPac, having settled the *Levin* case, proceeded in accordance with the settlement agreement to file its application with the Interstate Commerce Commission for authority to issue shares which would enable it to effectuate the plan of recapitalization which was the heart of the settlement agreement. Plaintiff appeared in that proceeding as a party of record. The report of the Commission dated December 6, 1973, 347 ICC 377 reveals that the Commission considered the reasonableness of the plan of recapitalization as it applied to the Class B stock. Expert testimony was presented in support of the plan and ten Class B shareholders including this plaintiff offered testimony to the contrary. The issues presented by the objectors included their

demand that the value of the B shares be measured by book value in accordance with their view of the requirements of the 1954 reorganization plan. The Class B objectors presented the argument that the class action in the Southern District was illegal and that the class voting rights which were established in the 1954 reorganization plan were immutable. The objectors argued that the vote of the MoPac stockholders which adopted the plan of recapitalization was invalid because of misrepresentations in the proxy statement. The alleged misrepresentations relate to the Allegheny/Jones matter. The objectors also alleged ill-defined improper conduct by the directors and generalized conspiracy and fraud. The Commission found all of the objectors' contentions to be without merit. The Commission ruled that the 1954 reorganization was not an "immutable contract for all time" and pointed out that the 1954 reorganization plan itself recognized the possibility of a change in the relationship between the two classes of stock.

Plaintiff moved for reconsideration which was denied. The motion for reconsideration was based upon plaintiff's argument that the *Levin* case was an illegal proceeding. Plaintiff's next petition which sought a finding that an issue of general transportation importance was involved was denied in March, 1974.

Seeking review of the action of the Interstate Commerce Commission, plaintiff commenced suit in this district in the case entitled *Gabriel v. United States,* Civil No. 74-471, filed April 3, 1974. After a multiplicity of motions in which plaintiff sought unsuccessfully to compel the joinder of the Internal Revenue Service as a party plaintiff, the case was decided in an opinion by Hon. Clarkson S. Fisher, writing for a three judge court, on April 20, 1976. *Gabriel v. United States,* 416 F. Supp. 810 (D.N.J. 1976). The opinion succinctly lists the issues decided and they are identical

to those dealt with by the Interstate Commerce Commission. Interestingly enough, while plaintiff's suit against the United States was pending here in this district, an identical suit, *Gillespie v. U.S.A.*, was brought in the Eastern District of Missouri. The case is entitled *Gillespie v. United States,* Civil No. 74-239-C(2). The three judge court in an opinion by Hon. John K. Regan disposed of the identical issues presented in *Gabriel v. United States,* 416 F. Supp. at 814 n.2.

Plaintiff made repeated efforts to convince the three judge court in this district to reconsider its order affirming the decision of the Interstate Commerce Commission. A motion for reargument was denied on May 29, 1976. A Letter-Opinion dated June 9, 1976 reads as follows: "The Court is in receipt of yet another motion for reconsideration of the Court's judgment. After consultation with the other two members of the Court, I am authorized to advise all parties that the motion is denied." Plaintiff's motion for reargument was denied on June 21, 1976 and another motion for reargument was denied on the following day.

After spending four years litigating the identical issues more or less simultaneously in three separate actions in a variety of forums and losing consistently, plaintiff attempted to take another bite from the apple when MoPac presented its plan for merger to the ICC. An extract from the ICC opinion of May 12, 1978 which deals with plaintiff's attempt to reopen the issues is quoted on page 8 of this report. It was at that point that plaintiff began this suit. Although plaintiff dropped out of the ICC proceedings, his brother, Napoleon, remained as a party of record and continued to flog the same issues in his petition for administrative review. It is clear beyond argument that all of the issues in this complaint which relate to the 1974 recapitalization are *res adjudicata.* The Supreme Court has recently restated the purposes

underlying the doctrines of *res judicata* and collateral estoppel as follows:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana v. United States,* 440 U.S. 147, 153-4 (1979).

Each of these purposes is implicated in Gabriel's attempt to circumvent prior rulings and to undermine proceedings currently underway in the Court of Appeals. *Kane v. City of New York,* 468 F. Supp. 586, 589 (S.D.N.Y. 1979).

Plaintiff's deliberate course of conduct over the past years in pursuing repeated baseless proceedings, all stemming from an identical fact situation demonstrates complete lack of good faith. Gabriel's pattern of copying or paraphrasing one complaint and motion from another and his past behavior of proceeding simultaneously in multiple suits in a variety of forums can show only this plaintiff's wish to harass the defendant by the abuse of legal process.

Particularly appropriate to this case are the words of *Hill v. Estelle,* 423 F. Supp. 690, 695 (S.D. Tex. 1976):

> It ... is within this Court's inherent power under 28 U.S.C. §1651(a) to enjoin litigants who are using the courts as a stage for their vendetta of harassment and abuse.

The court commented that a complaint, inflated with reference to law, cannot "camouflage the duplicitous and duplicative nature" of the claim.

> ... [T]he timing of the ... filing, the superficial changes in form between the ... complaints and the substantially idential nature of the complaints lead to the inexorable conclusion that plaintiffs maliciously have filed a complaint as to previously litigated matter in order to abuse the judicial process with the resultant effect of burdening the Court's already heavy caseload and obstructing the application of justice in more meritorious causes. 423 F. Supp. at 695.

Gambocz v. Yelencsics, 468 F.2d 837 (3rd Cir. 1972) involves a situation in which plaintiff's first suit was dismissed with prejudice on defendant's motion, the dismissal was affirmed on appeal and, while a petition for rehearing was still pending, a second suit was filed. It was held: "Injunctive relief was a proper remedy under the circumstances". 468 F.2d at 842. The court observed that *res judicata* barred a relitigation of the same subject. *Browning Debenture Holders Com. v. DASA Corp.*, 605 F.2d 35 (2nd Cir. 1979) holds that where an action is repetitious or intended to harass, a district court in the exercise of its equity jurisdiction and pursuant to the All Writs Statute, may enjoin plaintiff from further litigation based on facts previously alleged.

As noted in *Kane v. City of New York*, 468 F. Supp. at 590:

> It is true that litigious affinity alone does not support the grant of an injunction, for 'access to the Courts is one of the cherished freedoms of our

> system of government.' But when it becomes clear that the courts are being used as a vehicle for harassment by a 'knowledgeable and articulate experienced pro se litigant' who asserts the same claims repeatedly in slightly altered guise, the issuance of an injunction is warranted. (footnotes omitted)

In *Rudnicki v. McCormack*, 210 F. Supp. 905, 910 (D. Mass. 1962), appeal dismissed, 372 U.S. 226 (1963), it was said

> The English Courts have not hesitated to exercise the power thus vested in them by restraining what Professor Chafee refers to as 'pertinacious litigants' from abusing the process of the courts by the repeated institution of frivolous litigation.
>
> * * *
>
> The courts of the United States have also acted to enjoin a litigant from subjecting another to repeated, baseless and vexatious suits on the same subject matter, recognizing without question that such a course of conduct is a sufficient ground for the issuance of an injunction.

The historical background of the power is stated in *Higgins v. California Prune & Apricot Growers*, 282 F.2d 550, 557 (2nd Cir. 1922):

> It is elementary that these [equity] courts will interfere by injunction to prevent an inequitable

> use of legal processes, and their power to do so has been established since the decision of the Earl of Oxford's Case, 1 Ch. R. 1 determined the controversy between Lord Chancellor Ellesmere and Lord Chief Justice Coke in the times of Charles I.... In Story's Equity Jurisprudence (14th Ed.) §1226, it is said: 'Another class of cases to which the process of injunction is most beneficially applied is to suppress undue and vexatious litigation.'

It is submitted that an injunction is necessary in this case to insure the finality of judgments entered in this and other courts.

PERSONAL JURISDICTION

Although raised in the motion, the issue of personal jurisdiction over the defendants has not been briefed. The marshal's returns of service on the individual defendants indicate that they were not served in the manner provided by Rule 4(d)(1) or 7 Fed. R. Civ. P. Service on the individuals was made at a business address on persons connected with the business enterprise. Purported service on the New Jersey Commissioner of Motor Vehicles is, of course, no service in this case.

CONCLUSION

For the reasons stated it is respectfully recommended that the complaint be dismissed for lack of subject matter jurisdiction. It is respectfully recommended that plaintiff be permanently enjoined from instituting any suit in the federal court against any of these defendants or any other corporate officers or agents

regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

Respectfully submitted,

s/ Serena Perretti
SERENA PERRETTI
UNITED STATES MAGISTRATE

Dated: December 30, 1980

ORIGINAL TO THE CLERK

xc: .Hon. H. Lee Sarokin
.James C. Gabriel, P.O. Box 94, Sea Girt, N.J. 08750
.Leon Leighton, Esq., 25 Hadden Road, Scarsdale, N.Y. 08750

EXHIBITS

AFFIDAVIT OF ROBERT LeVASSEUR

STATE OF CONNECTICUT)
COUNTY OF NEW HAVEN)

Robert LeVasseur, being duly sworn, deposes and says:

1. At the time I intervened in 1968 as a plaintiff in a class action commenced by Betty Levin on December 29, 1967 in the United States District Court, Southern District of New York, Case #CIV 5095 (Edward Weinfeld), *Levin vs Mississippi River Corp.* 59 F.R.D. 353 (1973) I was the owner of 336 shares of Missouri Pacific Railroad Company Class B stock and 3000 shares of Class A stock of said railroad.

Dated: March 16, 1981
Waterbury, Connecticut

s/ Robert LeVasseur
Robert LeVasseur

VERIFICATION

STATE OF CONNECTICUT)
COUNTY OF NEW HAVEN)

ROBERT LeVASSEUR, being duly sworn, deposes and says that he has read the foregoing AFFIDAVIT and knows the contents thereof; that the same is true to the deponent's own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to these matters deponent believes it to be true.

Exhibits

Be it remembered that on this 16th day of March, 1981 personally appeared before me, a notary public of Connecticut, ROBERT LeVASSEUR, to me known and known to me to be the individual described herein and who has sworn to and executed the foregoing AFFIDAVIT, and he acknowledges to me that he executed the same.

Respectfully submitted,

s/ John J. Pacowta
My Commission Expires 4/85

I hereby certify that this
AFFIDAVIT is a TRUE COPY
of the original.

s/ Edwin G. Fisher
Notary Public of New Jersey
My Commission Expires Jan. 28, 1982

1199 199

(Continued from reverse side)

Dated June 5th, 1973

1199

JAMES C. GABRIEL
R D 1 BOX 16
COLTS NECK N J 07722

The undersigned acknowledges receipt of a copy of the Notice of such meeting and the accompanying Proxy Statement.

James C. Gabriel
AGAINST RECAPITALIZATION PLAN 1-0 SHARES CLASS B
(Signature of Stockholder)

IMPORTANT: Please sign exactly as name appears hereon. All joint owners should sign. When signing as Executor, Administrator, Attorney, Trustee or Guardian, please give full title as such. If a corporation, please sign full corporate name by authorized officer.

PLEASE SIGN, DATE AND RETURN YOUR PROXY PROMPTLY IN THE ENCLOSED ENVELOPE.

80-0713-8